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No. 80-1922

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONNA B. GRIER, PETITIONER

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED*

1. Whether the court of appeals erred in holding that petitioner, a female civilian employee of the Texas Air National Guard who was initially hired prior to the time that the Guard accepted female members, had failed to prove a violation of Title VII of the Civil Rights Act of 1964 based on the Guard's present practice of promoting to jobs ranked at grades higher than GS-5 only those civilian employees who are also Guard members, a practice based on the Guard's military needs.

2. Whether the court of appeals erred in holding that petitioner had failed to prove a violation of the Equal Pay Act based on the fact that she was paid less than Guard member civilian employees for performing the same functional tasks when the pay differential reflected different conditions of employment and, in particular, the fact that petitioner, unlike civilian employees who are also Guard members, is not subject to mobilization.

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*In addition to the Secretary of Defense, defendant-appellees below were the Chief of the National Guard Bureau, the Adjutant General of the State of Texas, and the members of the United States Civil Service Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) and the opinion of the district court (Pet. App. A5-A39) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1980 (Pet. App. A1). A petition for rehearing was denied on January 23, 1981 (Pet. App. A3). The petition for a writ of certiorari was filed on April 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Petitioner, a female civilian employee of the Texas Air National Guard, seeks review of the decision of the court of appeals rejecting her claims that the Guard (1) discriminated against her on the basis of sex by denying her a promotion, in violation of Title VII of the Civil Rights Act of 1964, and (2) paid higher wages to male employees doing the same work as petitioner, in violation of the Equal Pay Act.

1. The Texas Air National Guard is authorized to employ two types of civilian technicians. See National Guard Technicians Act of 1968, 32 U.S.C. 709. Although the duties of some civilian technicians (such as clerk typists and supply clerks) are such that the persons holding these jobs are not required to be members of the Guard, other technicians may be required to be members of the Guard, as a condition of their civilian employment, because the positions they hold may provide the Guard with important expertise during training periods and upon mobilization. Guard positions that require concurrent Guard membership are excepted service positions (32 U.S.C. 709(b), 709(d)); all other civilian technician positions are competitive service jobs. See H.R. Rep. No. 90-1823, 90th Cong., 2d Sess. 6 (1968). The Guard has traditionally classified civilian positions graded at and above the GS-6 level as excepted service, thus limiting competitive service employees to the GS-5 level. As the district court explained, the Guard reserves the higher paid civilian employee slots for employees who are also Guard members "to create a cadre of full-time employees who devote all their working hours to the Texas Air National Guard, and who also attend meetings and summer camps, and who will provide a skeleton of experienced, fully ready personnel in the event of mobilization" (Pet. App. A11). Approximately 85% of the Guard's civilian technician positions are filled by persons who are also Guard members (*id.* at A11-A12).

2. In 1962, when petitioner was hired as a supply clerk (GS-5), women were excluded from membership in the Guard. However, the district court found that petitioner would not have joined the Guard in 1962 in any event because "[h]er family commitments militated against her placing herself in a position where she would have been susceptible to mobilization," and there was no competent evidence to show that she could have passed the physical examination at that time (Pet. App. A10). Although women have been accepted as Guard members since 1972, petitioner would not have been accepted because of her weight and age, if she had applied in 1972 (*id.* at A33). Petitioner has worked for the Guard primarily as a supply clerk, but she has also performed certain tasks entailing greater responsibility which would be compensated at a higher rate, in the range of GS-6 to GS-8 levels, if performed by a civilian employee who is also a Guard member (*id.* at A15-A16). As a non-member, however, petitioner is not eligible for advancement beyond the GS-5 level (*ibid.*).

3. Petitioner brought this action in the United States District Court for the Southern District of Texas, alleging that the Guard's practices with respect to civilian technicians violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206. First, petitioner claimed that the Guard's practice of filling civilian technician positions at and above the GS-6 level only with Guard members perpetuated past discrimination as to women who were too old to qualify for Guard membership in 1972. With respect to these women, petitioner claimed that the Guard's practice of reserving higher grades for Guard members was a facially neutral practice having a disparate impact in violation of Title VII. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). Based on the trial evidence, the district court rejected petitioner's claim, holding that she had not shown by a preponderance of the evidence that her failure to be promoted

was based on sex. The court stated (Pet. App. A24-A25): "The factor which has limited Mrs. Grier's advancement in her employment is * * * the fact that she is not a member of the Air National Guard. Her situation is exactly the same as that of a male who went to work for the Air National Guard in 1962 but because of physical incapacity or family commitments, did not become a member of the Air National Guard." Further, the district court found that the Guard had proved "a compelling business necessity" for reserving its better paying positions for persons who are members of the Guard, namely "the necessity for creating a situation in which key civilian employees are subject to mobilization in the event of a national emergency" (*id.* at A38-A39).[1]

With respect to petitioner's Equal Pay Act claim, the court found that petitioner's job was not "equal" in terms of effort or responsibility to the jobs held by the Guard members who performed the same functional tasks (Pet. App. A32-A33). The court noted that petitioner was not subject to mobilization, and thus, unlike civilian employees who were also Guard members, she was not "subject to risks, hazards, potentialities of inconvenience and disruption" of her life (Pet. App. A19). The court further held that, although petitioner was performing the same functional tasks, she was not performing her job "under similar working conditions" to those of Guard members susceptible to mobilization (Pet. App. A36-A37). Finally, the court held (*id.* at A37) that the difference between the pay received by petitioner and that received by Guard members is based upon the Guard members' susceptibility to mobilization—a factor other than sex—and thus authorized by the Equal

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[1]The district court also held (Pet. App. A28-A30) that petitioner had not established sex discrimination through proof of disparate treatment. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

Pay Act. See 29 U.S.C. 206(d)(1)(iv). The district court therefore entered judgment for respondents, and the court of appeals affirmed (Pet. App. A1-A2).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioner's present grade and pay result not from discrimination of any kind, but simply from the fact that she is not a member of the Guard, which has chosen for reasons related to its vital military mission to restrict employment in higher grade civilian positions to persons who are Guard members. Women have, of course, been accepted as members since 1972, and there is no suggestion here that the Guard has discriminated against women members in making appointments to higher grade positions. No court has ever held that differentiating among persons on the basis of Guard membership violates either Title VII or the Equal Pay Act, and further review is therefore unwarranted.

1. Both courts below correctly rejected petitioner's Title VII claim because of the absence of any evidence to show that the Guard's practices had an actual disparate impact on petitioner, or, for that matter, on any other female employee who was too old to qualify for Guard membership in 1972. There is no merit to petitioner's contention (Pet. 7-9) that the decision below conflicts with this Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), by requiring her to show that she would have sought to be and been accepted as a Guard member in 1962, but for her sex. In *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 367-368, the Court stated:

> A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his

> is the not always easy burden of proving that he would have applied for the job had it not been for those practices.

Further, the Court noted (*id.* at 369 n.53):

> Inasmuch as the purpose of the nonapplicant's burden of proof will be to establish that his status is similar to that of the applicant, he must bear the burden of coming forward with the basic information about his qualifications that he would have presented in an application.

Petitioner clearly failed to shoulder this burden. She put forward no evidence to show that she would have joined the Guard in 1962, if she had been permitted to do so, or that she was otherwise qualified (Pet. App. A34-A36). Moreover, there was no evidence that the Guard membership requirement perpetuated past discrimination because there was no showing that non-member women employees fared less well than non-member male employees. As the district court noted, petitioner's position is no different from that of a man who went to work as a Guard supply clerk in 1962 but who, for any number of reasons, did not become a Guard member (*id.* at A37). Thus, the courts below correctly concluded (see *id.* at A10, A31-A32, A34-A36) that a *prima facie* case of sex discrimination had not been established.[2]

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[2]The district court, while finding that petitioner had failed to establish a *prima facie* case, also proceeded to discuss petitioner's failure to carry the ultimate burden of persuasion. Thus, even if petitioner had established a *prima facie* case of sex discrimination based on the Guard's promotion policy, the decision below is correct because the Guard clearly demonstrated a "compelling business" reason for the practice of reserving the higher grade jobs for military members (Pet. App. A37-A38). See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-432 (1971). Further, petitioner failed to show that the Guard's policy of reserving its better paying positions for members was a pretext to justify discrimination against women (Pet. App. A38). See *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978).

Petitioner also asserts (Pet. 5-7) that the district court erred in stating (Pet. App. A27-A28) that the Guard "had no legal obligation to eliminate every lingering effect of discrimination which was legal at the time it was practiced." However, that assertion also lacks merit. As petitioner recognizes (Pet. 6-7, quoting *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 349, quoting *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 430), Title VII prohibits only those policies neutral on their face that "operate to 'freeze' the status quo of prior discriminatory employment practices." Here, the Guard's prior policy of excluding females from membership had been abandoned and was no longer in effect when Title VII was made applicable to the government;[3] and it cannot be said that after that date the Guard's practice of reserving the better paying jobs for military members "operate[d] to 'freeze' the status quo of prior discriminatory employment practices" against women. Since 1972, the Guard has admitted women to membership, and women have therefore been eligible for civilian technician positions at and above the GS-6 level since that time. At all events, the fact that petitioner was too old to become a Guard member in 1972 was a consequence that occured prior to the effective date of the 1972 Amendments. Title VII does not require that an employer remedy pre-Act discrimination in these circumstances (see *Farris* v. *Board of Ed. of City of St. Louis*, 576 F. 2d 765 (8th Cir. 1978)); nor does Title VII require the hiring of a person who is unqualified for the job. *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 436.

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[3]Title VII was made applicable to federal employees, such as petitioner, in 1972. Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16. The Equal Pay Act was amended to include federal employees in 1974. Fair Labor Standards Act, 29 U.S.C. 203(e)(2)(A). See page 8, *infra*.

2. The courts below also correctly concluded that petitioner failed to show a violation of the Equal Pay Act, 29 U.S.C. 206(d), which requires that men and women be compensated equally for work that requires equal skill, effort, and responsibility, and is performed under similar working conditions. Because civilian employees who are also Guard members must maintain Guard membership as a condition of continued employment, and are thus constantly subject to possible mobilization, a non-member civilian employee's job is clearly unequal, even when he or she performs similar or identical functional tasks.

There is no merit to petitioner's contention (Pet. 9-11) that further review is warranted with respect to the finding below that the wage differential that existed between petitioner and Guard members was authorized because it was based on a factor other than sex. See 29 U.S.C. 206(d)(1)(iv). Because petitioner did not meet her burden of proving that she received lower compensation than male Guard members performing equal work, it is not necessary for this Court to consider whether respondents proved that the wage diffferential was justified. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). In any event, petitioner's contention that the Guard's compensation practice is sex-based is no more than an attack on the factual findings of the district court, which the court of appeals affirmed, and which are supported by substantial evidence. The record shows that the Guard's policy of limiting compensation at and above the GS-6 level to military members is applicable to male and female civilian employees alike, and neutral in operation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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